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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976
No. 76-422

E. C. DOTHARD, et al,

Appellants,

v.

BRENDA M. MIETH, et al,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF WASHINGTON STATE HUMAN RIGHTS COMMISSION, AMICUS CURIAE

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INTEREST OF AMICUS

The Court's disposition of this case will have a significant impact on employment of women in correctional institutions throughout the United States. The State of Alabama argues here that women should not be employed in prisons housing male felons; however, the State of Washington, by its Division of Adult Corrections and its Human Rights Commission, takes a strong position opposed to that of Alabama. The Washington Division of Adult Corrections has indicated a strong interest in working toward employment of more

women "inside the walls" of the state's adult male correctional institutions; its chief concern in this regard has been the legitimate concern for inmate privacy. (The same question, of course, applies to employment of men in women's prisons.) This concern has led the Division of Adult Corrections to petition the Washington State Human Rights Commission for a ruling on whether sex is a "bona fide occupational qualification" because of the inmates' right to be free from unwarranted intrusions upon personal privacy. The Washington State Human Rights Commission has issued its ruling, and wishes to inform this Court of Washington State's position on the bona fide occupational qualification issue raised by the *Dothard* case. This brief *amicus curiae* is therefore filed pursuant to U.S. Supreme Court Rule 42(4), urging affirmance of the District Court.

QUESTION PRESENTED

Whether Being Male is a Bona Fide Occupational Qualification for Employment as a Guard in a Male Prison, for Reasons of Inmate Privacy or for Reasons of Security.

SUMMARY OF ARGUMENT

The Washington State Human Rights Commission has repeatedly ruled that the right of privacy is a legitimate employment consideration. However, the Commission has invariably ruled that privacy considerations justify an employment disadvantage to one sex or the other *only* where there

exists unavoidable conflict between the right to be free from discrimination and the right of privacy. In other words, the Commission requires the employer to find and take the *least restrictive alternative.* Selective work assignments, schedules, etc. are avenues *strongly* preferred over any exclusionary employment policy. Only where sexual privacy will necessarily be invaded and where no alternative exists does the Commission consider sex to be a bona fide occupational qualification in employment, and then only to the extent necessary to protect the privacy. The Washington State Human Rights Commission strongly suggests to this Court that a balancing of the two rights is the correct approach to apparent conflict between privacy rights and employment rights. While the two may seem at times incompatible, they are yet never in actual warfare; a closer look and a small amount of flexibility on the part of employers preserves both the right of privacy on the one hand and the greatest measure of employment opportunity on the other.

Specifically, the Commission has considered the question presented by this case: the privacy rights of prison inmates balanced against the rights of women to be equally employed. It was the conclusion of the Commission (and the Commission urges its approach to this Court) that sex may be a consideration in employment of prison guards *only* where and to the extent that no alternative is available to alleviate or eliminate the privacy conflict.

Washington State Human Rights Commission Declaratory Ruling No. 19, 1 Washington Human Rights Reporter ..... (February 1977).* The burden is on the employer institution to reduce to a minimum the number of tasks and times and places which will require one or the other sex only. Then the balance is reached by recognizing the legitimate right of privacy and finding the least restrictive alternative, that which will reduce or eliminate the need for excluding one sex or the other.

The Commission has also considered whether being male is a bona fide occupational qualification for patrol or prison guard jobs for reasons of *security*. In its ruling denying a bona fide occupational qualification, the Commission noted that training is the critical factor in such jobs, and that individual capabilities must be considered. Washington State Human Rights Commission Declaratory Ruling No. 12, 1 Washington Human Rights Reporter IC-17 (September 1974). The law against discrimination means nothing else. The Commission urges this Court to look with caution upon arguments based on emotionalism and historical stereotypes, and to inquire instead whether Alabama can support its exclusionary hiring policy with observable, reportable facts.

*See Appendix C for text of declaratory rulings.

ARGUMENT

I. Legitimate Considerations of Inmate Privacy Do Not Justify an Exclusionary Hiring Policy.

The Washington State Law Against Discrimination prohibits sex discrimination in employment. Revised Code of Washington 49.60.030, 49-.60.180.* Two exceptions are recognized by the statute: bona fide occupational qualification (Revised Code of Washington 49.60.180(1)), and "where the [Washington State Human Rights Commission] by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes." Revised Code of Washington 49.60.180(3). The Washington State Human Rights Commission is the state agency established by the legislature with general powers to enforce its Law Against Discrimination. Revised Code of Washington 49.60.010, Revised Code of Washington 49.60.120.

Washington's Administrative Procedure Act authorizes state agencies to issue declaratory rulings "with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it." Revised Code of Washington 34-.04.080. By regulation, the Washington State Human Rights Commission has encouraged employers to seek such rulings before proceeding to consider sex (or any other protected category) as a bona fide

*See Appendix A for text of statutes.

occupational qualification in particular employment circumstances. Washington Administrative Code 162-16-030.* Procedures applicable to petitions for Commission rulings are set out in Washington Administrative Code 162-08-620.

A number of employers have availed themselves of this procedure and have petitioned the Commission for declaratory rulings as to whether sex can be a bona fide occupational qualification given their particular circumstances. Several of these petitions have raised the issue of personal privacy in various contexts, thus affording the Commission the opportunity to give repeated and measured consideration to the privacy question. The most recent petition raised one of the specific questions before the Court in this case: whether the right of privacy of prison inmates justifies the exclusion of women from certain guard jobs in male adult prisons. Washington State Human Rights Commission Declaratory Ruling No. 19, 1 Washington Human Rights Reporter ..... (February 1977).**

The Commission has had a number of years in which to develop its policy balancing the rights of privacy and freedom from discrimination. In June 1974 the Commission issued its Declaratory Ruling No. 10, holding that being male or female is a bona fide occupational qualification for locker room equipment clerks where, as in the facts presented, the clerks distributed clothing and equipment inside

*See Appendix B for text of regulations.
**See Appendix C for text of declaratory rulings.

and/or adjacent to shower and locker room facilities. The Commission stated:

> Community standards and respect for privacy require that a woman be free from the presence of members of the opposite sex during the use of locker room and shower room facilities and the same, of course, applies to men. This basic privacy consideration is discussed generally in the Law Against Discrimination with respect to terms and conditions of employment where it says that "it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex." RCW 49.60.180 (3).

Washington State Human Rights Commission Declaratory Ruling No. 10, 1 Washington Human Rights Reporter IC-14, 15 (June 1974).

Thus the Washington State Human Rights Commission in its first consideration of privacy recognized the legitimacy of privacy rights and recognized also that the state legislature in fact intended to incorporate a balance of the rights of privacy and of nondiscriminatory employment when it specifically permitted sex-segregated washrooms and locker facilities.

In January of 1975 the Commission was asked whether sex is a bona fide occupational qualification for clothing salespersons. The Commission stated:

> We tend to agree with your position that the presence of male sales personnel may have an adverse impact upon the conduct of a "fashion party" where women's clothes are taken off and

put on in the presence of others. We must stipulate, however, that being female, in this context, is a bona fide occupational qualification for sales personnel only if it is not reasonably practicable to have the female customers remove themselves to another room for the purpose of dressing and undressing.

Our concern here is for protection of personal privacy. If it is common for your customers to dress in private and then model their clothing to a group setting, then it would be our opinion that males are capable of performing the sales job. If, however, the dressing is done in front of the group, then we would rule such a setting to be one in which being female is a bona fide occupational qualification. We make this ruling cautiously, however, and emphasize that the burden is on the employer to show that no *reasonable alteration of operations* could occur which would eliminate the need for employing only one sex. (Emphasis in original)

Washington State Human Rights Commission Declaratory Ruling No. 13, 1 Washington Human Rights Reporter IC-19, 20 (January, 1975).

With this ruling the Commission began to define the factors important to the balancing between privacy and employment rights, and established the standard that only where the employer shows that no reasonable alteration of operations could occur will privacy considerations justify considering sex to be a bona fide occupational qualification.

In March of 1975 the Commission rejected a privacy argument. An employer sought a ruling that

being female was a bona fide occupational qualification for "hostesses" who welcomed new community residents, in part because the hostesses usually contacted housewives at home when they might be informally dressed. The Commission reiterated its no reasonable alternative standard, emphasizing that no bona fide occupational qualification can exist where "There could occur a reasonable alteration of the employer's practices which would eliminate the need to discriminate." Washington State Human Rights Commission Declaratory Ruling No. 15, 1 Washington Human Rights Reporter IC-28, 29 (March 1975).

In June of 1975 the Commission again considered the privacy question, this time in the context of university residence hall custodians. In substantial clarification of its no reasonable alternative standard, the Commission ruled:

> We again restate our position that the Law Against Discrimination permits sex being considered as a BFOQ where it is necessary to protect personal privacy *and* where no reasonable alteration of an employer's practice could occur which would eliminate a need to discriminate. With specific reference to the situation that you bring before us, that of residence hall custodians, we would rule that sex is a BFOQ provided that:
>
> (1) a necessary and significant portion of a custodian's job is to clean in areas where persons are normally and necessarily disrobed, i.e., shower and bath rooms;

(2) no reasonable alteration of the physical characteristics of the building could occur which would eliminate the need to discriminate;

(3) no reasonable alteration in the scheduling of the usage of the private areas in question could occur which would eliminate the need to discriminate;

(4) no reasonable alteration of the scheduling of the custodial force could occur which would eliminate the need to discriminate;

(5) the BFOQ applies only to those custodial positions for which a major portion of the work involves cleaning private areas;

(6) the BFOQ applies only to the extent necessary to make available in the custodial workforce the minimum numbers of males and females required to accomplish the cleaning of the halls.

It is our interpretation of the law that, whenever possible, it is required that the University first explore all possible methods of carrying out the maintenance of residence halls short of considering sex to be a BFOQ. For example, if it is possible to interrupt the usage of a particular restroom or bathing area for the period required to clean it, then such should be done, rather than resort to the employment of persons of only one sex. Similarly, if it is possible to rearrange the scheduling of the existing workforce in order to provide coverage for the private areas in question without resorting to the use of the BFOQ exemption in the law, then such should, as a matter of law, be the first action taken. And, of course, the BFOQ exemption should apply only to certain custodial positions, not to all.

Having recognized the legitimate application of the BFOQ provision of the law, within limitations, to the employment of residence hall custodians, we must emphasize that sex availability, rather than exclusivity is the key issue at hand. We do not feel it necessary that sex be a BFOQ in hiring when it is merely necessary to *assign* persons of one sex or the other to a particular task. But where there are inadequate numbers of one sex available to make the necessary work assignments, then sex may be considered a BFOQ as a short term and remedial measure. (Emphasis in original)

Washington State Human Rights Commission Declaratory Ruling No. 16, 1 Washington Human Rights Reporter IC-30, 31 (June 1975).

With Declaratory Ruling No. 16, the Commission refined and made specific the criteria underlying the no reasonable alternative standard. The standard will apply "where persons are normally and necessarily disrobed," and the elements of the standard include the employer's attempt to eliminate the need to discriminate by alteration of physical structures, alteration of work schedules, alteration of schedules of usage of 'private' areas. The burden is upon the employer to show that a major portion of the job *necessarily* infringes upon privacy, that no reasonable alternative is available.

The Commission next considered the privacy

question in July of 1976. The employer was a state residential school for children afflicted with cerebral palsy. The older children objected to receiving intimate bodily care (bathing, toilet care and dressing) from attendants of the opposite sex. The attendants in question had no medical or other training. The Commission ruled that requirements set out in its earlier Declaratory Ruling No. 16 (*supra*) applied to these facts, and that insofar as necessary to ensure availability of attendants of both sexes to provide intimate care for older children, the school would be permitted to hire a sex-balanced work force. The Commission placed particular emphasis on the fact that the service and care rendered by the attendants "is uniquely intimate * * * involving contact with and view of the intimate portions of a client's anatomy." Washington State Human Rights Commission Declaratory Ruling No. 17, 1 Washington Human Rights Reporter IC-32, 35 (July 1976).

Thus the Washington State Human Rights Commission has for years been striking a balance between the right of privacy and the right to be free from sex discrimination in employment. Its most recent ruling considers the precise question presently before this court: to what extent, if any, the right of privacy justifies exclusion of women from employment as prison guards. The Washington State Human Rights Commission concluded that legitimate concern for privacy justifies certain sex-

exclusive work assignments and may in rare instances justify sex-exclusive hiring—where the institution has met the burden of showing no reasonable alternative exists.

The opportunity for this ruling was afforded by concern for inmate privacy on the part of the Division of Adult Corrections of the Washington State Department of Social and Health Services. The director of that division joined with the chief of the Department's Office of Minority Affairs/Affirmative Action to petition the Commission for a ruling that sex be a bona fide occupational qualification where inmates are "normally and necessarily disrobed," and where certain other circumstances cannot be altered. Washington State Human Rights Commission Declaratory Ruling No. 19, *supra*, at 2. The Commission ruled that privacy considerations would justify excluding one sex from certain work assignments in the corrections institutions. However, the Commission insisted that every alternative be first exhausted:

> We conclude that the personal privacy rights of the residents justify the consideration of the sex of employees in making work assignments within the institutions. Every effort must be made, however, to minimize the need for sex-based work assignments, since such distinctions may restrict the opportunities of members of a particular sex to obtain diversified work experience. The "business necessity" standard should be met in establishing the need to make sex-

based work assignments, including a showing that no reasonable operational alternatives exist. Such alternatives as restructuring job duties, altering work schedules, and modifying programs and physical structures must be explored and are preferred as alternatives to sex-based work assignments. Our ruling permits consideration of sex in setting work assignments only in connection with positions where the issue of personal privacy affects necessary and major portions of the job duties in question after a thorough job-by-job analysis. Additionally, our holding is based upon the requirement that an equal standard of personal privacy be enforced in both male and female correctional institutions.

Washington State Human Rights Commission Declaratory Ruling No. 19, *supra*, at 3-4.

Further, the Commission ruled that sex-based work assignments may not be permitted to interfere with promotional opportunities or other terms and conditions of employment. Declaratory Ruling No. 19, *supra*, at 4. As to sex-exclusive *hiring* of guards, the Commission had the following to say:

> It is our determination in connection with this petition that sex not be considered a BFOQ in the hiring of correctional staff, except when necessary as a short term and remedial hiring measure within the above described conditions, and only when customary hiring methods will fail to produce an adequate sexual mix of employees. In any event, we can find no justification for excluding members of either sex from applying for employment at a correctional institution and being placed on a register of available qualified applicants.

Washington State Human Rights Commission Declaratory Ruling No. 19, *supra*, at 5.

It is thus apparent that in its development of a balancing approach to the privacy issue the Washington State Human Rights Commission has reached precisely the conclusion reached by the district court below:

> This court is of the opinion that this tension between the individual's right to employment without regard to his or her sex and the inmates' right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications * * * . We are convinced that procedures may be arranged so as to alleviate much of the legitimate inmate concern for privacy, short of denying women the job.

Mieth v. Dothard, 418 F.Supp. 1169, 1185 (M. D. Ala. 1976).

It is clear that a balancing of the two rights is inevitable; the Washington State Human Rights Commission urges this Court that the balancing is best accomplished, with least violence to either right, by application of the 'no reasonable alternative' standard.

II. Considerations of Security in Adult Male Penitentiaries Do Not Justify Alabama's Sex-Exclusive Hiring Policy.

Alabama asks this Court to uphold its Board of Corrections Administrative Regulation No. 204,* which establishes a sex-exclusive hiring policy for virtually all guard positions in state prisons. Alabama defends its regulations on several grounds, one of which is privacy (discussed in §I, *supra*). The other rationale argued by Alabama is that of security: women, says the Alabama Board of Corrections, cannot perform adequately as prison guards because they are too physically weak,** and would *inevitably* disrupt inmates of a male prison. (The latter is alleged to be a matter of "innate recognition.") Brief of Appellants at 50, 51.

What may be intuitively obvious to the Alabama Board of Corrections however is not so clear to the Washington Division of Adult Corrections. In its petition to the Washington State Human Rights Commission for the declaratory ruling on prison guards, the Division of Adult Corrections of Washington State Department of Social and Health Services did not advance any argument except privacy—and that in a limited context. See discussion, §I, *supra*. In fact at the hearing on the petition, Mr. Harold B. Bradley, Director of the Division, testified that women guards in Washington prisons do and will perform the same duties as do males, and he opposed the security argument presented by

*See Appendix B for text of regulations.

**It is interesting in this context that the height and weight requirements imposed by Alabama for the job of prison guard are 5'2" and 120 lbs. Title 55, §373 (109), Code of Alabama (194) (Recomp. 1958). Presumably then, any man 5'2" tall and weighing 120 lbs. is better qualified than any woman whatever her size and weight.

the Union. This testimony was noted and relied upon by the Commission in its ruling. Washington State Human Rights Commission Declaratory Ruling No. 19, *supra*, at 6. At that hearing the "security" argument was urged by representatives of the Washington Federation of State Employees, which represents the (mostly male) prison guards in Washington institutions. The Commission rejected the argument as based on sex stereotypes, and reminded the Union that the law against discrimination requires that individuals be treated as individuals and not as members of a general class. Declaratory Ruling No. 19, *supra*, at 6. In this ruling the Commission was guided by its earlier ruling that being male was not a bona fide occupational qualification for guard and patrol personnel:

> But it is not, in our judgment, necessary that your personnel be male. In a ruling on a sex-discrimination case, *Weeks v. Southern Bell Telephone and Telegraph Company*, 508 F.2d 228, in finding that discrimination had been practiced in employment aganst a woman, the court stated:
>
> "The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."
>
> We draw on this principle in emphasizing that whether persons can sufficiently defend themselves from assault, whether sexual or otherwise physical, is an individual judgment,

based upon individual capabilities. The issue is training, skill, and knowledge. A poorly trained male will perform just as ineptly as a poorly trained female; the converse is also true, that females with adequate instruction can fulfill the requirements of the job with competence.

But even if, percentage-wise, less women are capable of performing security-related duties than are men, this is no justification for discrimination. Persons are still to be treated as individuals so that they are not bound by the limitations or stereotype roles of their particular identity group, be it racial, sexual, or other.

Washington State Human Rights Commission Declaratory Ruling No. 12, 1 Washington Human Rights Reporter IC-17, 18, 19 (September 1974).

Thus on two occasions the Washington State Human Rights Commission has considered the other bona fide occupational qualification question presently before this Court, that of security, and has held each time that individual capabilities, not sex, must be the determinant. Appellants at bar are in the awkward position of arguing that no woman of any size or experience or training is capable of adequate performance as an Alabama prison guard. They argue against reality.

CONCLUSION

Based on its own experience in determining comparable problems under the law of the State of Washington, the Washington State Human Rights Commission believes that the district court decided this case correctly. It urges affirmance.

Respectfully submited,

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APPENDIX A

TEXT OF RELEVANT STATUTES

Revised Code of Washington 34.04.080
Revised Code of Washington 49.60.010
Revised Code of Washington 49.60.030
Revised Code of Washington 49.60.120
Revised Code of Washington 49.60.180
Title 55, 373(109), Code of Alabama (1940) (Recomp. 1958)

34.04.080 Declaratory ruling by agency——Petition——Court review. On petition of any interested person, an agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. Such a ruling is subject to review in the superior court of Thurston county in the manner hereinafter provided for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition. [1959 c 234 § 8.]

49.60.010 Purpose of chapter. This chapter shall be known as the "law against discrimination". It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the

provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap; and the board established hereunder is hereby given general jurisdiction and power for such purposes. [1973 1st ex.s. c 214 § 1; 1973 c 141 § 1; 1969 ex.s. c 167 § 1; 1957 c 37 § 1; 1949 c 183 § 1; Rem. Supp. 1949 § 7614-20.]

49.60.030 Freedom from discrimination——Declaration of civil rights. (1) The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical handicap is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions without discrimination: *Provided however*, That different insurance rates may be continued and/or applied on the basis of sex when bona fide statistical differences in risk or exposure are substantiated.

(2) Any person deeming himself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, to recover the actual damages sustained by him, or both, together with the cost of suit including a reasonable attorney's fees or any other remedy authorized by this chapter or the United States Civil Rights Act of 1964; and

(3) Notwithstanding any other provisions of this chapter, any act prohibited by this chapter related to sex discrimination which is committed in the course of trade or commerce in the state of Washington as defined in the Consumer Protection Act, chapter 19.86 RCW, shall be deemed an unfair practice within the meaning of RCW 19.86.020 and subject to all the provisions of chapter 19.86 RCW as

now or hereafter amended. [1974 ex.s. c 32 § 1; 1973 1st ex.s. c 214 § 3; 1973 c 141 § 3; 1969 ex.s. c 167 § 2; 1957 c 37 § 3; 1949 c 183 § 2; Rem. Supp. 1949 § 7614-21.]

49.60.120 Certain powers and duties of board. The board shall have the functions, powers and duties:

(1) To appoint an executive secretary and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(2) To obtain upon request and utilize the services of all governmental departments and agencies.

(3) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this chapter, and the policies and practices of the board in connection therewith.

(4) To receive, investigate, and pass upon complaints alleging unfair practices as defined in this chapter because of sex, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.

(5) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of sex, race, creed, color, national origin, marital status, age, or the presence of any sensory, mental, or physical handicap.

(6) To make such technical studies as are appropriate to effectuate the purposes and policies of this chapter and to publish and distribute the reports of such studies. [1973 1st ex.s c 214 § 4; 1973 c 141 § 7; 1971 ex.s. c 81 § 1; 1957 c 37 § 7; 1955 c 270 § 8. Prior: 1949 c 183 § 6, part; Rem. Supp. 1949 § 7614-25, part.]

49.60.180 Unfair practices of employer defined. It is an unfair practice for any employer:

(1) To refuse to hire any person because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, unless based upon a bona fide occupational qualification: *Provided*, That the prohibition against discrimination because of such handicap shall not apply if the particular disability prevents the proper performance of the particular worker involved.

(2) To discharge or bar any person from employment because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap: *Provided*, That it shall not be an unfair practice for an employer to segregate washrooms or

locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the board by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: *Provided*, Nothing contained herein shall prohibit advertising in a foreign language. [1973 1st ex.s. c 214 § 6; 1973 c 141 § 10; 1971 ex.s. c 81 § 3; 1961 c 100 § 1; 1957 c 37 § 9. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

CODE OF ALABAMA

TITLE 55, § 373(109)

(1940) (Recomp. 1958)

Minimum standards for applicants and appointees as law-enforcement officers; employment of applicants; qualifications. — The minimum standards hereafter in this section provided shall apply to applicants and appointees as law-enforcement

officers who are not law-enforcement officers in the state on the effective date of this article and to applicants and appointees who, though law-enforcement officers on the effective date of this article, cease to be law-enforcement officers before making application for employment as a law-enforcement officer or being employed as a law-enforcement officer. No city, town, county, sheriff, constable or other employer shall employ any such applicant who is not on the effective date of this article a law-enforcement officer and who continues until the date of his application as a law-enforcement officer unless such person shall have first submitted to the appointing authority an application for such employment verified by affidavit of the applicant and showing compliance with the following qualifications:

(a) Age.—The applicant shall be not less than 21 nor more than 45 years of age at the time of appointment; provided, however, that for the purpose of calculating his age under this article, the time spent by any applicant on active duty in the armed forces of the United States of America, not exceeding four years, shall be subtracted from the actual age of such applicant who has attained the age of 40 years.

(b) Education.—The applicant shall be a graduate of a high school accredited with or approved by the state department of education or shall be the holder of a certificate of high school equivalency issued by general educational development.

(c) Police training.—Prior to appointment, the applicant shall have completed at least 240 hours of formal police training, in a recognized police training school, which shall include the Federal Bureau of Investigation Police Training Academy, or another training school approved by the Commission; provided, that an applicant may be provisionally appointed without having completed the police training herein prescribed subject to the condition that he shall complete such training within 9 months after provisional appointment and should he fail to complete such training, his appointment shall be null and void.

(d) Physical qualifications. — The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law-enforcement officer. The commission may for good cause shown permit variances from the physical qualifications prescribed in this subdivision.

(e) Character.—The applicant shall be a person of good moral character and reputation. His application shall show that he has never been convicted of a felony or a misdemeanor involving either force, violence or moral turpitude, and shall be accompanied by letters from three qualified voters of the

area in which the applicant proposes to serve as a law-enforcement officer attesting his good reputation.

The foregoing requirements shall not apply to any person who is presently employed as a law-enforcement officer in the state and who continues to be so employed when he makes application for or is employed as a law enforcement officer in a different capacity or for a different employer. (1971, No. 1981, p. 3227, § 7, appvd. Sept. 20, 1971; 1971, 3rd Ex. Sess., No. 156, p. 4399, § 1.)

APPENDIX B

TEXT OF REGULATIONS

Washington Administrative Code 162-08-620
Washington Administrative Code 162-16-030
Administrative Regulation 204, Alabama Board of Corrections

WAC 162-08-620 DECLARATORY RULINGS.

(1) **Petition.** Petitions for declaratory rulings under RCW 34.04.080 shall contain the following:

(a) A statement of the question on which the declaratory ruling is sought;

(b) A full statement of the facts giving rise to the question;

(c) A statement of the basis for the petitioner's interest in the question.

(2) **Confirmation, Investigation.** In order to determine the full facts giving rise to the question the board may require the petitioner to submit additional information, and it may make an independent investigation.

(3) **Consideration and Disposition.** When the board is satisfied that it understands the question on whch the declaratory ruling has been sought, it shall:

(a) Issue a nonbinding declaratory ruling;

(b) Notify the petitioner that no declaratory ruling will be issued; or

(c) Set a time and place for hearing argument on the question, notify the petitioner of them, and issue either a binding or nonbinding declaratory ruling after the hearing.

WAC 162-16-030 ADVICE OF COMMISSION. When requested to do so, the commission's staff will advise persons on how to meet particular employment needs consistently with the law against discrimination. In order to be safe, persons are advised to petition the commission for a declaratory ruling (see WAC 162-08-620) before proceeding to consider race, creed, color, national origin, age, sex, marital status, or handicap to be a bona fide occupational qualification in particular circumstances, unless the commission or another public agency with comparable jurisdiction has directed or authorized the action.

Administrative Regulation 204, Alabama Board of Corrections

Selective Certification
Correctional Counselor I Positions

I. GENERAL

1. The purpose of this regulation is to establish policy and procedure for identifying and designating institutional Correctional Counselor I positions which require selective certification for appointment of either male or female employees from State Personnel Department registers.

2. Appointment of employees for Correctional Counselor I positions are initially made from the Correctional Counselor Trainee register. They remain in a Trainee status for six months, at the end of which time they are promoted to Correctional Counselor I if they have satisfactorily completed all phases of their training.

3. The policies and procedures established by this regulation have been coordinated with the Director of the State Personnel Department.

II. POLICY

4. All Correctional Counselor I positions will be evaluated to identify and designate those which require selective certification for appointment of either a male or female employee. Such positions must fall within a bona fide occupational qualification stated in Title 45-2000c of the United States Code as interpreted by the General Council of the Equal Employment Opportunity Commission's letter dated January 13, 1976, attached as Annex A.

5. Selective certification from the Correctional Counselor Trainee register will be requested of the State Personnel Department whenever a position is being filed which has been designated for either a male or female employee only.

6. The Commissioner has final authority to approve the designation of an institutional Correctional Counselor I position which requires selective certification.

7. The Associate Commissioner for Administration is responsible for requesting all Correctional Counselor Trainee registers from the State Personnel Department.

III. PROCEDURE

8. Institutional Wardens and Directors will identify each institutional Correctional Counselor I position which they feel requires selective certifi-

cation and will request that it be so designated in writing to the Associate Commissioner for Administration for his review, evaluation, and submission to the Commissioner for final decision.

9. The request will contain the exact duties and responsibilities of the position and will utilize and identify the following criteria to establish that selective certification is necessary;

A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patroling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require search of inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

10. All institutional Correctional Counselor I positions which are not approved for selective certification will be filled from Correctional Counselor Trainee registers without regard to sex.

IV. APPLICATION

11. The policies and procedures established by this regulation do not affect current appointments in Correctional Counselor classes nor does it affect

the power of the Commissioner to hire or discharge any employee.

V. REFERENCES

12. Title 45-2000c, United States Code

13. Letter from the General Council of the Equal Employment Opportunity Commission.

APPENDIX C

TEXT OF DECLARATORY RULINGS

Washington State Human Rights Commission Declaratory Ruling #10, 1 Washington Human Rights Reporter IC-14 (June 1974)

Washington State Human Rights Commission Declaratory Ruling #12, 1 Washington Human Rights Reporter IC-17 (Sept. 1974)

Washington State Human Rights Commission Declaratory Ruling #13, 1 Washington Human Rights Reporter IC-19 (Jan. 1975)

Washington State Human Rights Commission Declaratory Ruling #15, 1 Washington Human Rights Reporter IC-28 (Mar. 1975)

Washington State Human Rights Commission Declaratory Ruling #16, 1 Washington Human Rights Reporter IC-30 (June 1975)

Washington State Human Rights Commission Declaratory Ruling #17, 1 Washington Human Rights Reporter ..... (Feb. 1977)

Washington State Human Rights Commission Declaratory Ruling #19, 1 Washington Human Rights Reporter ..... (Feb. 1977)

DECLARATORY RULING NO. 10

JUNE 18, 1974

Sex as a Bona Fide Occupational Qualification for Locker Room Equipment Clerks. Being male or female is a bona fide occupational qualification for locker room equipment clerks.

TO: Mary Robinson, Affirmative Action Officer
Western Washington State College
Bellingham, Washington 98225

You have asked for a declaratory ruling on whether being male or female is a bona fide occupational qualification for locker room equipment clerks. You explain (by copy of memorandum by Chairperson of Western Washington State College's Department of Physical Education) that persons performing as equipment clerks must carry out their duties inside and/or adjacent to the men's or women's gymnasium locker and shower areas. You mention that "standards of propriety" would prevent a male from being an equipment clerk in the women's locker and shower areas and vice versa for a woman in the men's areas.

R.C.W. 49.60.180 says:

> It is an unfair practice for any employer: (1) to refuse to hire any person because of such person's * * * sex * * * unless based upon a bona fide occupational qualification.

It would appear that the performance of the equipment clerk's duties would require that person to be present in the men's or women's locker and

shower area when such areas are in use. Community standards and respect for privacy require that a woman be free from the presence of members of the opposite sex during the use of locker room and shower room facilities and the same, of course, applies to men. This basic privacy consideration is discussed generally in the Law Against Discrimination with respect to terms and conditions of employment where it says that "it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex." R.C.W. 49.60.180(3).

It is therefore the ruling of this Commission that being male or female is a bona fide occupational qualification for locker room equipment clerks, where there exists a compelling concern for protection of personal privacy.

Having so ruled, we direct your attention to WAC 162-16-040, which reads:

> **WAC 162-16-040** IDENTIFICATION IN USE. Inquiries or specifications of race, creed, color, national origin, age, sex, marital status, or handicap should always be accompanied by a statement that one or more of these qualities is a bona fide occupational qualification for the job, along with a reference to the source of that conclusion. In the absence of such a statement, the commission will consider the inquiry or specification to be evidence of an unfair practice.

It is important to comply with this section whenever you specify employees of one sex or other to employment agencies, in advertisements, job announce-

ments, or elsewhere. The absence of such an explanation will cause needless work for you and for us responding to questions and complaints. We suggest using words such as the following:

> Being male or female is a lawful job qualification for locker room equipment clerks, Washington State Human Rights Commission Declaratory Ruling No. 10.

DECLARATORY RULING NO. 12

SEPTEMBER 19, 1974

Sex is not a Bona Fide Occupational Qualification for Guard or Patrol Personnel. Being male is not a bona fide occupational qualification for guard or patrol personnel.

TO: Mr. C. B. Pennington
Surrey Patrol System
308 Jones Building
Third and Union
Seattle, Washington 98101

You have asked for a declaratory ruling on whether being male is a bona fide occupational qualification for guard and patrol personnel. You explain:

> Very briefly, the dangers involved in our present work are of such nature that I—or you—wouldn't think of exposing our daughters or spouses to the physical crippling—or death—exposure involved; and in the case of females, the added possibility of rape.
> Also involved are the weather conditions our personnel must include as part of the conditions of their employment.

> Our present activities provide for our personnel being alone at their patrol duties and guard posts which increases the exposure of physical injury. Our requirement for frequent check-ins only alert us, that in the case of a check-in not being received, it is time to investigate.
> We are actively seeking those security positions of the type we could fill with persons, without the future possible criticism, which your office and agency would have to share, that we were negligent and "knew" or "should have known" the risks involved.

R.C.W. 49.60.180 says:

> It is an unfair practice for any employer:
> (1) To refuse to hire any person because of such person's * * * sex * * * unless based upon a bona fide occupational qualification.

The term "bona fide occupational qualification" is discussed and partially defined in WAC 162-16-020.

Your business is to provide security personnel, who at times may be exposed to physical danger, whether they are male or female. It is, therefore, important that your staff receive adequate training and be properly equipped.

But it is not, in our judgment, necessary that your personnel be male. In a ruling on a sex-discrimination case, *Weeks v. Southern Bell Telephone and Telegraph Company*, 508 F. 2d 228, in finding that discrimination had been practiced in employment against a woman, the court stated:

> The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

We draw on this principle in emphasizing that whether persons can sufficiently defend themselves from assault, whether sexual or otherwise physical, is an individual judgment, based upon individual capabilities. The issue is training, skill, and knowledge. A poorly trained male will perform just as ineptly as a poorly trained female; the converse is also true, that females with adequate instruction can fulfill the requirements of the job with competence.

But even if, percentage-wise, less women are capable of performing security-related duties than are men, this is no justification for discrimination. Persons are still to be treated as individuals so that they are not bound by the limitations or stereotype roles of their particular identity group, be it racial, sexual, or other.

It is therefore the ruling of this Commission that being male is not a bona fide occupational qualification for guard and patrol personnel, from the standpoint of physical capability or exposure to physical harm.

With respect to your argument regarding weather conditions endured by your personnel, no evidence has been presented (nor do we believe any exists) which would support a position that weather affects women in an exceptionally adverse way. Accordingly, it our ruling that being male is not a bona fide occupational qualification for guard and patrol personnel from the standpoint of exposure to weather conditions.

DECLARATORY RULING NO. 13

JANUARY 16, 1975

Sex as a Bona Fide Occupational Qualification for Clothing Sales Job to Protect Personal Privacy. Being female is a bona fide occupational qualification for clothing sales jobs to protect personal privacy at a "fashion party" where women's clothes are taken off and put on in the presence of others.

TO: Marie Bromgard
917 S. Fifth Avenue
Yakima, Washington 98902

You have asked for a declaratory ruling on whether being female is a bona fide occupational qualification for sales personnel for Beeline Fashions. You state that the nature of the sales work involves appearing at "fashion parties" where women try on and style your women's clothing fashions. You further contend that the presence of male sales personnel would be inhibiting and embarrassing to your customers.

R.C.W. 49.60.180 says:

> It is an unfair practice for any employer:
> (1) To refuse to hire any person because of such person's * * * sex * * * unless based upon a bona fide occupational qualification.

The term "bona fide occupational qualification" is discussed and partially defined in WAC 162-16-020 which says that one area recognized for bona fide occupational qualification is:

> (2) (a) Where a person's race, creed, color, national origin, age, *sex*, marital status, or handicap will be essential to, or will contribute to, the accomplishment of the purposes for which the person is hired. (Emphasis added)

We tend to agree with your position that the presence of male sales personnel may have an adverse impact upon the conduct of a "fashion party" where women's clothes are taken off and put on in the presence of others. We must stipulate, however, that being female, in this context, is a bona fide occupational qualification for sales personnel only if it is not reasonably practicable to have the female customers remove themselves to another room for the purpose of dressing and undressing.

Our concern here is for protection of personal privacy. If it is common for your customers to dress in private and then model their clothing in a group setting, then it would be our opinion that males are capable of performing the sales job. If, however, the dressing is done in front of the group, then we would rule such a setting to be one in which being female is a bona fide occupational qualification. We make this ruling cautiously, however, and emphasize that the burden is on the employer to show that no reasonable alteration of operations could occur which

would eliminate the need for employing only one sex.

Having so ruled, we call your attention to WAC 162-16-040, which reads:

> IDENTIFICATION IN USE. Inquiries or specifications of race, creed, color, national origin, age, *sex*, marital status, or handicap should always be accompanied by a statement that one or more of these qualities is a bona fide occupational qualification for the job, along with a reference to the source of that conclusion. In the absence of such a statement, the commission will consider the inquiry or specification to be evidence of an unfair practice. (Emphasis added)

Should you feel that the facts of your situation fall within our above stated position and you wish to exert a claim of bona fide occupational qualification, it is important to comply with this section whenever you specify employees of one sex or another in advertisements and solicitations for employment applicants. The absence of such an explanation will result in misunderstandings. We suggest using words such as the following:

> Being female is a lawful job qualification for this position under the guidelines of Washington State Human Rights Commission Declaratory Ruling No. 13.

DECLARATORY RULING NO. 15

MARCH 20, 1975

Sex is not a Bona Fide Occupational Qualification for Community Hosting Personnel. Being female is not

a bona fide occupational qualification for community hosting personnel.

TO: Ronald W. Freeman, Manager
Newcomers Service of Tacoma
Box 44414
Tacoma, Washington 98444

You have asked us to rule whether being female is a bona fide occupational qualification for your hosting personnel under R.C.W. 49.60.180, the Washington State Law Against Discrimination. Your business involves the welcoming of new residents of your area.

In your letter of March 3, 1975, you state several reasons for wanting to hire only females and we summarize the reasons as follows:

(1) Your business is designed to "reach the average housewife, who generally does the family shopping."
(2) "Housewives always have something in common * * * and therefore sets a comfortable atmosphere in which our hostesses can best present our sponsors in the most favorable light possible."
(3) "Our hostesses make calls as early as 8:30 a.m. when women are still in their robes, and in the evening when it is dark. Therefore, Newcomers Service feels that a male hostess would cause considerable suspicion as to motive, as well as embarrassment to our newcomer housewives, and reflect extremely poor taste * * *"
(4) As a part of your training program, your

hosting personnel are instructed on the use of certain cosmetics and skin care and are instructed regarding bra fittings. Currently your instruction includes having the trainee sample these products. The same as above occurs with respect to hairdressing. The purpose of this training is, as you say, to familiarize the hosting personnel with the products of the businesses you represent, so that they may recommend these products to new residents.
You state that certain "equipment such as breasts and hair * * * is vital to our *training program*." (Emphasis added)

R.C.W. 49.60.180 says, in relevant part:

It is an unfair practice for any employer:
(1) To refuse to hire any person because of such person's * * * sex * * * unless based upon a bona fide occupational qualification

Information concerning the Commission's view of bona fide occupation qualification is contained in WAC 162-16-020.

As a general rule, the courts and the Commission have held that the term "bona fide occupational qualification" must be narrowly construed so as to make lawful discrimination the exception to the rule, rather than the rule itself. Examples of situations jusifiably involving sex as a bona fide occupational qualification are those involving the need for authenticity (such as in entertainment and modeling) and the need for personal privacy. A bona fide occupa-

tional qualification would not exist in the above or other circumstances, however, if there could occur a reasonable alteration of the employer's practices which would eliminate the need to discriminate.

It is our opinion, after having examined your arguments, that:

(a) With respect to your argument, number (2) above, customer preference is not a legitimate grounds for discrimination from the standpoint of setting a comfortable atmosphere; nor do we agree that all housewives have something in common to the extent that this would justify discrimination against males (or females who are not housewives). If it is true that your customers would feel more comfortable with persons of their own sex, this is probably the result of a long tradition of discrimination which the law now forbids. This situation is analogous to the argument of a customer who desires to be served by only persons of one race;

(b) With respect to argument (3), we suggest that this problem could be alleviated through the use of publicity, advanced telephone calls, and proper identification. We recognize and appreciate your legitimate need to hire persons of the highest moral character for these positions, but we do not feel moral character is discerned on the basis of a person's sex.

(c) With respect to argument (4), we believe that your instructional methods could be reasonably changed to adequately train

male personnel in selling the mentioned products, particularly since only a few of your products are substantially sex-related. Further, we note that your mention of concern for personal privacy arises only during the training program and not during the course of carrying out hosting work.

We believe that the problems you cite are those of adaptation, not sex, and it is therefore our ruling that being female is not a bona fide occupational qualification within the meaning of the law for your community hosting personnel.

DECLARATORY RULING NO. 16

JUNE 26, 1975

Sex is a Bona Fide Occupational Qualification for College Residence Hall Custodians. Sex is a bona fide occupational qualification to the extent necessary to make available custodians of both sexes for the maintenance of private areas in residence halls.

TO: Robert C. Cook
Staff Human Rights Officer
Department of Personnel Services
116 Lewis Hall DW-70
University of Washington
Seattle, Washington

You have asked us to rule whether sex is a bona fide occupational qualification (BFOQ) for residence hall custodians. You quote the following description of a custodian's job:

Presently, male custodians are cleaning either or both male and female bathrooms, and female

> custodian are doing the same. We are beginning to have complaints from residents regarding the assignment of a male custodian to a female bathroom or vice versa. • • •

Your concern is for the need to employ persons on the basis of sex in order to protect the personal privacy of those living in the residence halls.

R.C.W. 49.60.180 makes it an unfair practice to discriminate against persons in employment unless based upon a bona fide occupational qualification. The Commission's general approach to interpreting the "BFOQ" provision is explained in WAC 162-16-020 and WAC 162-16-130. You have also stated your awareness of previous declaratory rulings of the Commission which recognize sex as a BFOQ where necessary to protect personal privacy.

We again restate our position that the Law Against Discrimination permits sex being considered as a BFOQ where it is necessary to protect personal privacy and where no reasonable alteration of an employer's practice could occur which would eliminate a need to discriminate. With specific reference to the situation that you bring before us, that of residence hall custodians, we would rule that sex is a BFOQ provided that:

(1) A necessary and significant portion of a custodian's job is to clean in areas where persons are normally and necessarily disrobed, i.e., shower and bath rooms;

(2) No reasonable alteration of the physical characteristics of the building could occur

which would eliminate the need to discriminate;

(3) No reasonable alteration in the scheduling of the usage of the private areas in question could occur which would eliminate the need to discriminate;

(4) No reasonable alteration of the scheduling of the custodial force could occur which would eliminate the need to discriminate;

(5) The BFOQ applies only to those custodial positions for which a major portion of the work involves cleaning private areas;

(6) The BFOQ applies only to the extent necessary to make available in the custodial workforce the minimum numbers of males and females required to accomplish the cleaning of the halls.

It is our interpretation of the law that, whenever possible, it is required that the University first explore all possible methods of carrying out the maintenance of residence halls short of considering sex to be a BFOQ. For example, if it is possible to interrupt the usage of a particular restroom or bathing area for the period required to clean it, then such should be done, rather than resort to the employment of persons of only one sex. Similarly, if it is possible to rearrange the scheduling of the existing workforce in order to provide coverage for the private areas in question without resorting to the use of the BFOQ exemption in the law, then such should, as a matter of law, be the first action taken. And, of course, the

BFOQ exemption should apply only to certain custodial positions, not to all.

Having recognized the legitimate application of the BFOQ provision of the law, within limitations, to the employment of residence hall custodians, we must emphasize that sex availability, rather than exclusivity is the key issue at hand. We do not feel it necessary that sex be a BFOQ in hiring when it is merely necessary to assign persons of one sex or the other to a particular task. But where there are inadequate numbers of one sex available to make the necessary work assignments, then sex may be considered a BFOQ as a short term and remedial measure.

Having so ruled, should you determine that the circumstances of your residence halls justify application of the BFOQ principle, we direct you to WAC 162-16-040,130, and 140 for information on the solicitation of employment applicants and job orders.

DECLARATORY RULING NO. 17

JULY 15, 1976

Sex is a Bona Fide Occupational Qualification for Intimate Bodily Care. Being male or female is a bona fide occupational qualification for intimate bodily care but only to the extent necessary to maintain an adequate balance of males and females in the workforce to carry out the necessary functions.

TO: Ms. Jan Rosbach
Affirmative Action Officer
Washington State Department of Personnel
Box 1789
Olympia, Washington 98504

By letter of June 29, 1976, you have asked for a declaratory ruling on whether being male or female is a bona fide occupational qualification, at certain times, for the hiring of Attendant Counselor I positions at the Cerebral Palsy Center at Rainier School, Buckley, Washington. This ruling is given under the provisions of WAC 162-08-620 and R.C.W. 34.04.080. We quote from your letter as follows:

> The Cerebral Palsy Center at Rainier School has a current population of 38 patients, 19 males and 19 females. This unit provides care for patients through 20 years of age.
>
> Many of the older patients (15-20 years) have voiced concern regarding the practice of persons of the opposite sex providing bathing, toileting, and dressing care. This has caused a great deal of embarrassment to these patients. I am requesting that the Rainier School be allowed to hire specifically men or women for Attendant Counselor I positions within the Cerebral Palsy unit in order to maintain a balance when necessary to provide sufficient care of patients who object to persons of the opposite sex attending their personal needs.
>
> The staffing differs from that of a regular hospital or nursing home in that the persons providing this type of care are not medically trained. The minimum qualifications of an Attendant Counselor I require only completion of 8th grade of school and allows for the substitution of experience in practical nursing or child care for the education.

The Washington State Law Against Discrimi-

nation makes it an unfair practice to discriminate in employment on the basis of sex and other grounds, "unless based upon a bona fide occupational qualification." R.C.W. 49.60.180(1). The Commission's general approach toward interpretating the "bona fide occupational qualification (BFOQ)" provision of the law is contained in Chapter 162-16 WAC. We consider your request to present to us two issues for determination:

(1) whether sex is a BFOQ in the hiring of Attendant Counselor I's from the standpoint protecting personal privacy; and,

(2) to what extent is an exercise of the BFOQ provision of the law necessary to accomplish your business necessities?

The Commission has held on numerous occasions that sex is a BFOQ when necessary for "maintaining conventional standards of sexual privacy", and where it is "essential to the accomplishment of the purposes of the job." WAC 162-16-130. The BFOQ provision may be applied, however, only when the employer is able to meet the burden of proving that "no reasonable alteration of operations could occur which would eliminate the need for employing only one sex." Declaratory Ruling No. 13 (January 16, 1975). On questions of sex being a BFOQ to protect personal privacy, the Commission has ruled that such is a proper application of the law for locker room equipment clerks, Declaratory Ruling No. 10 (June 20, 1974), for intimate apparel fitters, Declaratory Ruling No. 13 (January 16, 1975) and for residence hall custodians who work in private residence areas, Declaratory Ruling No. 16 (June 26, 1975).

We consider your request to pose questions which are similar to those raised in Declaratory Ruling No. 16. In that case, the petitioner (the University of Washington) stated that a certain number of both males and females were required in the custodial workforce to carry out maintenance functions in private areas of the residences, bathrooms, etc. We quote the following portions of that ruling, which are applicable in principle to the case now before us:

> We again restate our position that the Law Against Discrimination permits sex being considered as a BFOQ where it is necessary to protect personal privacy and where no reasonable alteration of an employer's practice could occur which would eliminate a need to discriminate. With specific reference to the situation that you bring before us, that of residence hall custodians, we would rule that sex is a BFOQ provided that:
>
> (1) a necessary and signficant portion of a custodian's job is to clean in areas where persons are normally and necessarily disrobed, i.e., shower and bath rooms;
> (2) * * *
> (3) * * *
> (4) no reasonable alteration of the scheduling of the custodial force could occur which would eliminate the need to discriminate;
> (5) the BFOQ applies only to those custodial

positions for which a major portion of the work involves cleaning private areas;

(6) the BFOQ applies only to the extent necessary to make available in the custodial workforce the minimum numbers of males and females required to accomplish the cleaning of the halls.

It is our interpretation of the law that, whenever possible, it is required that the University first explore all possible methods of carrying out the maintenance of residence halls short of considering sex to be a BFOQ. For example, if it is possible to interrupt the usage of a particular restroom or bathing area for the period required to clean it, then such should be done, rather than resort to the employment of persons of only one sex. Similarly, if it is possible to rearrange the scheduling of the existing workforce in order to provide coverage for the private areas in question without resorting to the use of the BFOQ exemption in the law, then such should, as a matter of law, be the first action taken. And, of course, the BFOQ exemption should apply only to certain custodial positions, not to all.

Having recognized the legitimate application of the BFOQ provision of the law, within limitations, to the employment of residence hall custodians, we must emphasize that sex availability, rather than exclusivity is the key issue at hand. We do not feel it necessary that sex be a BFOQ in hiring when it is merely necessary to assign persons of one sex or the other to a particular task. But where there are inade-

quate numbers of one sex available to make the necessary work assignments, then sex may be considered a BFOQ as a short term and remedial measure. Declaratory Ruling No. 16, *supra*.

The circumstances of your request, we recognize, would vary from the above situation in that the service and care rendered by the Attendant Counselor I's is uniquely intimate, in fact, involving contact with and view of the intimate portions of a client's anatomy. This fact, it is our ruling, therefore justifies sex as a bona fide occupational qualification, within the same limitations as were applied in Declaratory Ruling No. 16. Specifically, our permission to apply the BFOQ provision covers only those positions which involve a large degree of intimate bodily care and where the patient or client would object to services being rendered by a member of the opposite sex. Further, you must first attempt to accomplish the necessary personal care functions by rearranging the scheduling of personnel, without applying the BFOQ exception to the general rule on non-discrimination.

The central issue in this case, as it was in Declaratory Ruling No. 16, we emphasize, is the need to make available the minimum number of workers of both sexes to enable the employer to make the necessary work assignments for carrying out sex-related private functions. It is not permissible to, in all cases, specify the sex of the person to be hired. It is permissible to do so in order to maintain a proper balance

of male and female employees, when business necessity so requires. Such a scheme will not detract from the employment opportunities of either males or females, and such a practice is condoned by the Law Against Discrimination, which states:

> That is shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the board by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes. R.C.W. 49.60.180(3).

Having so ruled, we direct your attention to, and require compliance with, as a condition of this ruling, WAC 162-16-040, which reads:

> IDENTIFICATION IN USE. Inquiries or specifications of race, creed, color, national origin, age, sex, marital status or handicap should always be accompanied with a statement that one or more of these qualities is a bona fide occupational qualification for the job, along with a reference to the source of that conclusion. In the absence of such a statement, the commission will consider the inquiry or specification to be evidence of an unfair practice.

To avoid misunderstandings on the part of the public and job applicants, we suggest that the following language be used in job orders, announcements, and descriptions:

> Being male (or female) is a bona fide occupational qualification for certain Attendant Counselor I positions, under Washington State Human Rights Commission Declaratory Ruling No. 17.

DECLARATORY RULING NO. 19

Employment/Sex Discrimination: Sex is a bona fide occupational qualification in the assignment of correctional officers to protect personal privacy, within limitations.

Employment/Sex Discrimination: Sex is a bona fide occupational qualification in the hiring of correctional officers only to the extent required to make available adequate numbers of workers of a particular sex to carry out privacy-related assignments.

To: Harold B. Bradley, Director
Adult Corrections Division
Washington State Department of
Social and Health Services
Olympia, Washington 98504
and
George E. Clark, Chief
Office of Minority Affairs/Affirmative Action
Washington State Department of
Social and Health Services
1700 East Cherry Building
Seattle, Washington 98122

You have petitioned for a declaratory ruling under the provisions of RCW 34.04.080 and WAC

162-08-620 on "whether being male or female is a bona fide occupational qualification at certain times and in certain places for the hiring of correctional staff in adult correctional institutions." The Commission has considered your letter of September 28, 1976 and other written material and has reviewed the November 1, 1976 letter from counsel for the Washington Federation of State Employees. Oral argument was heard on this matter from both the petitioners and the employee union on January 20, 1977, at which time the latter submitted affidavits of three correctional officers. This is a binding declaratory ruling.

> Your letter of September 28, 1976 states, in part:
> "* * * In order to maintain security present institutions were constructed to provide surveillance which allows no privacy in the cells, lavatories, or shower rooms. Staff must carry out duties inside or adjacent to these open facilities and also must perform searches of residents, requiring intimate contact with, and view of residents' anatomies.
> "Residents are placed in adult correctional institutions by court order and cannot exercise personal choice in the living arrangements imposed upon them. Community standards of respect for privacy require that individuals be free from the presence of the opposite sex while taking off and putting on clothes, using toilet facilities, and showering. Recognizing the residents' personal dignity and right to maintain conventional standards of personal privacy, we request

> that sex be a bona fide occupational qualification in areas where persons are normally and necessarily disrobed.
> "Application of bona fide occupational qualifications will be monitored by a committee composed of Adult Corrections Division staff and Office of Minority Affairs/Affirmative Action staff. The committee has made an intensive study of each institution including the posts and duties of the correctional staff and will ensure the use of BFOQ's where:
>
> 1. No reasonable alteration of the physical characteristics of the building or of program operation could eliminate the need to discriminate;
> 2. It is necessary to provide in a particular location the minimum number of males or females required to provide the personal privacy for the residents;
> 3. It is essential to the accomplishment of the purpose for which the person is hired.
>
> "The committee will conduct annual reviews to determine if conditions and circumstances continue to warrant the application of BFOQ's."

GENERAL APPROACH

The Law Against Discrimination makes it an unfair practice to discriminate in employment on the basis of sex (and other grounds), "unless based upon a bona fide occupational qualification." RCW 49.60-.180(1). See WAC Chapter 162-16 for our general approach to the bona fide occupational qualification portion of the law.

Consistent with our view that this particular exemption from the general rule of non-discrimination should be narrowly construed, we have held sex to be a bona fide occupational qualification (BFOQ) when necessary for "maintaining conventional standards of sexual privacy" and where it is "essential to the accomplishment of the purposes of the job." WAC 162-16-130. The burden of proof is on the employer in such cases to show that "no reasonable alteration of operations could occur which would eliminate the need for employing only one sex." Declaratory Ruling No. 13, 1 WHRR IC-19 (January 16, 1975); Declaratory Ruling No. 17, 1 WHRR IC-32 (July 15, 1976). Such a showing would make considerations of sex a "business necessity." Declaratory Ruling No. 17, *supra*, at IC-35.

PRIVACY

It is our ruling in this matter that sex may be considered in the employment of adult correctional personnel where necessary to protect the personal (physical) privacy of the residents.* The limitations of this ruling are described herein.

As you have stated, persons are involuntarily committed to the state's correctional institutions. Their living conditions are controlled by the state. Hence, the state must assume responsibility for ensuring the health, safety, and dignity of the institu-

*This ruling addresses employment in areas "where persons are normally and necessarily disrobed", as stated in your letter of September 28, 1976, and extends only to those situations where considerations of sex is necessary to protect inmate privacy and where no alternatives exist, as explained herein.

tions' residents. Protection from invasion of personal privacy is essential to the dignity of those within male and female correctional institutions and in the particular setting becomes an extremely valuable commodity.

WORK ASSIGNMENTS

We conclude that the personal privacy rights of the residents justify the consideration of the sex of employees in making work assignments within the institutions. Every effort must be made, however, to minimize the need for sex-based work assignments, since such distinctions may restrict the opportunities of members of a particular sex to obtain diversified work experience. The "business necessity" standard should be met in establishing the need to make sex-based work assignments, including a showing that no reasonable operational alternatives exist. Such alternatives as restructuring job duties, altering work schedules, and modifying programs and physical structures must be explored and are preferred as alternatives to sex-based work assignments. Our ruling permits consideration of sex in setting work assignments only in connection with positions where the issue of personal privacy affects necessary and major portions of the job duties in question after a thorough job-by-job analysis. Additionally, our holding is based upon the requirement that an equal standard of personal privacy be enforced in both male and female correctional institutions.

PROMOTIONAL OPPORTUNITIES

We are authorized to permit that terms and conditions of employment be based upon sex when we find the practice "to be appropriate for the practical realization of the equality of opportunity between the sexes." RCW 49.60.180(3). Sex-based work assignments fall within the coverage of this provision of the law if the effect of the practice is to ensure equal opportunity in all aspects of employment.

Specifically, it is our ruling that the sex-based assignment scheme in question must not limit the work experience of members of a particular sex in a manner that would adversely affect promotional opportunities. Nor should it adversely affect other terms and conditions of employment. To restrict the work experience of members of a particular sex and then punish them in career advancement for their lack of experience would clearly conflict with the purposes of the law and with the "practical realization of equality of opportunity between the sexes."

HIRING

Having ruled that sex may be considered in the assignment of correctional personnel (within limitations), we turn to the issue of the legality of hiring limitations or specifications based upon sex. We have addressed this issue before in situations posing similar questions of law:

> "* * * we must emphasize that sex availability, rather than exclusivity is the key issue at hand. We do not feel it necessary that sex be

> a BFOQ in hiring when it is merely necessary to assign persons of one sex or the other to a particular task. But where there are inadequate numbers of one sex available to make the necessary work assignments, then sex may be considered a BFOQ as a short term and remedial (hiring) measure." Declaratory Ruling No. 16, 1 WHRR IC-32 (June 26, 1975); quoted agai.. in Declaratory Ruling No. 17, *supra*, at IC-34.

As succinctly stated in our ruling on "Attendant Counselor" positions at the state cerebral palsy center:

> "It is not permissible to, in all cases, specify the sex of the person to be hired. It is permissible to do so in order to maintain a proper balance of male and female employees, when business necessity so requires." Declaratory Ruling No. 17, *supra*, at IC-35.

It is our determination in connection with this petition that sex may not be considered a BFOQ in the hiring of correctional staff, except when necessary as a short term and remedial hiring measure within the above described conditions, and only when customary hiring methods will fail to produce an adequate sexual mix of employees. In any event, we can find no justification for excluding members of either sex from applying for employment at a correctional institution and being placed on a register of available qualified applicants.

Our ruling is intended to apply to the circumstances presented in this petition for declaratory rul-

ing and is not a determination of corrective employment measures which may be appropriate under WAC Chapter 162-18.

UNION'S ARGUMENTS

We have permitted argument on the petition from the Washington Federation of State Employees as a "friend of the Commission" in the interest of resolving related issues in the same forum at the same time. In summary, the Federation objects to the hiring of women as correctional officers at male correctional institutions for the following reasons:

(1) Women are incapable of or unlikely to respond to acts of violence occuring within the male institutions;

(2) Women will be assigned to less than the full range of duties of male correctional officers and will draw the same pay; and,

(3) Women correctional officers would be assigned to areas where contact with inmates is limited, thus restricting the ability of males with more seniority to bid on such jobs.

The first issue is easily disposed of by the principles cited in our previous ruling involving the employment of women as guard and patrol personnel. Declaratory Ruling No. 12, 1 WHRR IC-17 (September 19, 1974). There we stated that proper training is more important than the sex of persons employed in positions involving potential physical harm. In ruling that being male was not a bona fide occupational qualification, we held:

> "A poorly trained male will perform just as ineptly as a poorly trained female; * * *
> "But even if, percentage-wise, less women are capable of performing security-related duties than are men, this is no justification for discrimination. Persons are still to be treated as individuals so that they are not bound by the limitations or stereotpye roles of their particular identity group * * *"

The same applies to the instant matter.

The second assertion of the Federation conflicts with the statement of petitioner Bradley during oral argument that women will be expected to perform within the applicable job description on the same basis as males. The fact that tasks which invade a prisoner's physical privacy will not be carried out by women in the male institutions, nor by men at women's institutions, does not significantly affect the comparability of work. Equal opportunity between the sexes carries with it equal responsibility, a concept left intact by this ruling.

The third argument of the Federation, it would appear, can be reduced to a statement that either women should perform all work assignments associated with the duties of a correctional officer (including those in "private" areas), or they should not be hired at all. To exercise discretion in the placement of women in non-private areas would, as we understand the union's position, interfere with the seniority bidding rights of male employees. Specifically, the non-private positions to which women would be

assigned are some of the most desirable jobs, according to the union.

The Federation's all-or-nothing approach to the hiring of women and the position of the petitioners are inconsistent and the two must be reconciled. We have already held that sex-based work assignments are permissable under the law in certain cases. Therefore, in addressing the Federation's arguments we may rule that women should be hired to the fullest extent possible and that inconsistent collective bargaining rights or customs in bidding for jobs must be adjusted so as not to interfere with the realization of equal employment opportunity. Or, in the alternative, we may adopt the union's position and rule that no women are to be hired. It should be obvious that the former is the only appropriate choice before us. Any other holding would cause women to suffer a denial of their civil rights, in blatant disregard of the purpose of the Law Against Discrimination.

Whether or not the collective bargaining agreement provides guarantees on work assignments to those with the most seniority is not a determination that we must reach. A collective bargaining agreement is superceded by inconsistent provisions of the Law Against Discrimination. Declaratory Ruling No. 14, 1 WHRR IC-27 (March 19, 1975). A labor agreement which has unlawfully discriminatory effects can become a liability of the labor union under the provisions of RCW 49.60.190. A public employer's liability for such an agreement arises out of both the

Law Against Discrimination (RCW 49.60.180) and the Equal Rights Amendment to the state Constitution (Const. Article 31). The latter demands a heightened sensitivity by public officials to issues of sexual equality.*

Public policy on this issue being clear, we conclude that seniority bidding "rights" are not sufficient to overcome the need for balancing the civil rights of potential female correctional officers and the need for the employer to protect the personal privacy of the residents of the institutions. To base employment decisions in this matter only on seniority rights would perpetuate the exclusion of women from employment in male adult correctional facilities. It is simply unfair and discriminatory to subject women to competition based on seniority in a system from which they have been historically excluded.

The Commission is guided in this matter by the court's ruling in *U.S. v. Libbey-Owens Ford Co.*, D.C. Ohio, 3 FEP Cases 373 (1971), a case involving the seniority rights of men who claimed to be adversely affected by a consent decree involving the hiring of women. There the court stated:

> "However, certain fundamentals must be understood. A system which discriminates against some individuals necessarily discriminates in favor of others. The only way that the discrimination against some can be eliminated is to eliminate also that which is in favor of the others. This does not mean that the tables are turned

*The Law Against Discrimination is enacted to fulfill constitutional provisions concerning civil rights, RCW 49.60.010.

> so that the former underdog is now top dog, and vice versa, but only that in the future there will be neither. Necessarily, however, the one who was formerly in a favored position will no longer be so favored and thus may well suffer some loss. The loss, however, is only of that privilege or benefit to which the loser was not justly entitled."

The court's reasoning is applicable in this case. Male correctional officers occupy a position of relative privilege (at least in terms of the ability to accrue seniority) because of a past exclusion of women. Accordingly, employment practices which are based on seniority must bend to the extent necessary to implement public policies of non-discrimination. The need to make adjustments in seniority will decrease in proportion to the level of equality of opportunity achieved between the sexes. In this respect, the Federation may best serve the interests of its members, male *and* female, by working for the introduction of women into as many areas of employment as possible.

This binding declaratory ruling is issued this 17th day of February, 1977.

/s/ WINIFRED M. DUNCAN
Chairperson

/s/ ROY FLORES
Commissioner

/s/ KENNETH WEBSTER
Commissioner

/s/ W. H. PAGE
Commissioner

/s/ LINDA HUME
Commissioner

Attest:
/s/ BILL W. HILLIARD
Executive Secretary